

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

DARRYL T. COGGINS,

*Plaintiff,*

v.

COUNTY OF NASSAU et al,

*Defendants.*

Docket 07-cv-03624-JFB-AKT

United States Courthouse  
Central Islip, New York

June 26, 2012

11:17 a.m. - 12:55 p.m.

TRANSCRIPT FOR CIVIL CAUSE MATTER  
ORAL ARGUMENT ON DEFENDANT'S MOTION AND OPINION OF THE COURT  
BEFORE THE HONORABLE A. KATHLEEN TOMLINSON  
UNITED STATES MAGISTRATE-JUDGE

A P P E A R A N C E S :

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1 COURTROOM DEPUTY: Calling 07-3624, Coggins v. County  
2 of Nassau et al. Please state your appearances for the record.

3 MR. CALLISTE: For the Plaintiff, the Law Offices of  
4 Frederick K. Brewington, by Gregory Calliste. Good morning,  
5 Your Honor.

6 THE COURT: Good morning.

7 MS. PETILLO: Good morning, Your Honor; for the Nassau  
8 County Defendants, Diane C. Petillo, with the Nassau County  
9 Attorneys' Office.

10 THE COURT: Good morning.

11 MR. WEINGARD: For the Defendant Buonora, Your Honor,  
12 Laurence Jeffrey Weingard.

13 THE COURT: Good morning.

14 MR. SENFT: And associated with Mr. Weingard, Mitchell  
15 F. Senft.

16 THE COURT: Good morning. All right. Mr. Weingard,  
17 this is your motion, so if you'd like to start the oral  
18 argument, you --

19 MR. WEINGARD: You want me at the podium, ma'am?

20 THE COURT: It would be helpful for us in terms of  
21 picking this up on the record, yes. Because these are all --  
22 these conferences are recorded.

23 MR. WEINGARD: Judge, before we even start on any  
24 legal argument with regard to the motion, I wonder if the Court  
25 is familiar with the Rehberg case.

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1 THE COURT: Yes, very familiar, and I'm --

2 MR. WEINGARD: I would have assumed as much, ma'am.

3 THE COURT: And I am certain that you're going to make  
4 various applications, which frankly for today's purposes, don't  
5 involve me. You're going to wind up going back to Judge Bianco,  
6 I'm sure.

7 MR. WEINGARD: Well, that's the point. Let me tell  
8 you what my position should be at the moment in my view. I  
9 think the right way to proceed since we are asking for grand  
10 jury minutes, and there are observations in Rehberg that are  
11 very appropriate to that, it seems as though the Court in  
12 dealing with the function of the grand jury in Rehberg made  
13 specific points that it would create a situation, which parties  
14 in the 1983 proceeding would be asking for and obtaining  
15 transcripts of the grand jury testimony, which may have been  
16 had. And as you may recall, there were actually two separate  
17 grand jury proceedings. There was one against the Plaintiff --

18 THE COURT: Yes.

19 MR. WEINGARD: -- and then of course one against my  
20 client as a Defendant.

21 THE COURT: Yes.

22 MR. WEINGARD: And we know that we have been supplied  
23 with some of that material --

24 THE COURT: Yes.

25 MR. WEINGARD: -- during discovery, but we have not

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1 been supplied with all of the material, including several  
2 independent police witnesses from other jurisdictions, as well  
3 as the persons who were in the Plaintiff's car at the time of  
4 the stop.

5 It's my position, and it always has been my position  
6 that this case requires dismissal on the basis of absolute  
7 immunity. Straight dismissal on the basis of absolute immunity  
8 in a summary judgment proceeding. That's the way I proceeded  
9 initially, and as you will undoubtedly recall, we went all the  
10 way up on petitions for certiorari for the Supreme Court.

11 THE COURT: Yes.

12 MR. WEINGARD: That petition was denied just before  
13 the petition in Rehberg was granted.

14 THE COURT: Mm-hm.

15 MR. WEINGARD: I would think, and I'm speculating  
16 here; but I would think it's highly likely that the Court felt  
17 that Rehberg was an appropriate vehicle for deciding these  
18 issues. And as part of Rehberg, as you know, they point out not  
19 only that the grand jury minutes could be obtained, and that  
20 that could cause all sorts of problems vis-à-vis the secrecy of  
21 the grand jury proceedings, but in addition to that, they  
22 eviscerated, for all intensive purposes, the complaining witness  
23 rule and the extra-judicial conspiracy exception to Briscoe,  
24 which this circuit had had in place for a number of years.

25 Given all of those things, I would suggest that this

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1 matter ought to be adjourned without date; meaning this motion,  
2 put over without date. During the course of which, we would  
3 attempt, if I could find the correct vehicle to get there, and I  
4 will, I just don't know it as I stand here today; we will  
5 attempt to get before Judge Bianco, and to in some way renew the  
6 application for absolute immunity predicated on the Rehberg  
7 decision, which I believe is all encompassing and deals with  
8 each and every issue I raised I guess four years ago when this  
9 case first started. So, if the Court would listen to that  
10 application; that is an application for just the continuance  
11 without date, I would appreciate that. I don't believe there's  
12 any prejudice to anybody in doing that.

13 I know the Plaintiff's counsels have joined in our  
14 application and filed their own papers. I have not seen  
15 anything from the county attorney, except objections to our  
16 application, but it would seem logical to me, even though the  
17 County Attorney's Office never participated in the summary  
18 judgment application for absolute immunity, that they may well  
19 choose to at some point join in that application at this  
20 juncture since it will involve at least another police officer,  
21 Officer Vara, who was the Nassau County Police Officer who  
22 testified against my client under a grant of immunity, and whose  
23 testimony I must have in order to properly proceed in this case.

24 Rather than violate the secrecy provisions of the  
25 grand jury now, and I would think the Court may feel obliged to

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1 do that based on my application; rather than do that and so that  
2 it does not appear inappropriate for us to make that application  
3 at this moment, we would suggest adjourning it and getting  
4 before Judge Bianco or yourself or whoever where appropriately  
5 to be, and really stressing what the Supreme Court has  
6 accomplished in determining that the conflict of circuits, and I  
7 would remind you that there were eight circuits, which favor the  
8 position that I was advancing.

9 THE COURT: And the second circuit was the odd man  
10 out. Yes, I'm well aware of that.

11 MR. WEINGARD: And they have it.

12 THE COURT: Go ahead.

13 MR. WEINGARD: I notice how they frame that in the  
14 opinion. They don't identify circuits, except for the 11<sup>th</sup>  
15 circuit. And my own feeling is that it might have been easier  
16 to take an 11<sup>th</sup> circuit case, so they could have a nine-judge  
17 court as opposed to one of the judges having to possibly excuse  
18 herself from hearing that case. And I would remind you that  
19 Rehberg was a nine/zero decision. It was a unanimous court.  
20 So, given those circumstances and even though it's a relative  
21 long drive for me to come out here, I would think it's  
22 appropriate to adjourn this *sine die*.

23 THE COURT: All right. Does the Plaintiff wish to be  
24 heard?

25 MR. CALLISTE: Judge, only insofar as to state that

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1 even if the Court makes a determination with respect to whether  
2 Defendant Buonora was absolutely immune regarding his testimony  
3 there are still actions, the actions, the actual physical  
4 actions taken Defendant Buonora that are not subject to  
5 immunity. And I don't believe that that would be -- that  
6 argument before Judge Bianco would be dispositive in terms of  
7 the Defendants in this case. So, I think that the right cause  
8 of action would be to proceed here and to make the appropriate  
9 application to Judge Bianco if Defendant Buonora believes that  
10 that's the right thing to do. But at this point the parties  
11 have already convened here and I don't think that adjourning it  
12 would be -- I don't think it would lead to any sort of different  
13 outcome.

14 THE COURT: All right. You want to respond to that?

15 MR. WEINGARD: I do. There are no actions that were  
16 taken by Buonora. He did not physically assault; he did not  
17 make an arrest; this individual surrendered with his lawyers the  
18 next day as I recall. The investigation was conducted by  
19 detectives; there were various people on the scene, specifically  
20 Vara, as the arresting officer. Buonora did nothing but show up  
21 and give chase when the Defendant, now Plaintiff, ran away. And  
22 in addition to that, they lost him. He was gone.

23 And then what occurred with regard to the securing of  
24 the vehicle, the locating of the 357 Magnum pistol at the scene  
25 of a particular fence where the Plaintiff jumped off, and the

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1 materials also found alongside the car, which consisted, as I  
2 recall, of a fully loaded 357 Magnum -- the Magnum cylinder with  
3 bullets, I should have said. So, a Magnum was found at one  
4 location where the Plaintiff jumped over a fence. Not by my  
5 client, who lied to the grand jury as to that and was tried --  
6 not tried -- and was charged, and eventually pleaded guilty to  
7 misdemeanor perjury.

8           With respect to all of the issues, my client could not  
9 conceivably, even if we were using the standards, the Malley  
10 Standard and various other standards, could not conceivably, in  
11 light of Rehberg, have been a complaining witness, no affidavit,  
12 did nothing, never pressed a charge, and was sent home from the  
13 scene at 7:40 in the morning. [He] didn't know anything about  
14 this case, other than the fact that he was called to the grand  
15 jury.

16           So I don't understand Plaintiff's position.  
17 Plaintiff's position would undercut the concept of absolute  
18 immunity, as I read the case law, requires not to defend,  
19 because then it's not absolute immunity. The concept is you  
20 have to dispose of it at the earliest possible time and you have  
21 to dispose of it in such a way so as not to incur expense to the  
22 client, which would also kill absolute immunity, which would  
23 include additional time on the part of the individual. And if  
24 everybody who was entitled to absolute immunity had to go  
25 through those proceedings, it wouldn't be absolute.



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1 THE COURT: All right. I have your point. Thank you.

2 MR. WEINGARD: Thank you.

3 THE COURT: Ms. Petillo, you want to be heard?

4 MS. PETILLO: I join in the request to adjourn this  
5 matter. In light of the subsequent case law, I would like to  
6 review it with respect to Officer Vara, because there is an  
7 issue of the malicious prosecution, which factors into the grand  
8 jury testimony.

9 THE COURT: All right. Well, let me explain this.  
10 There are separate issues here. One has to do what this request  
11 for the release of the grand jury minutes, the other has to do  
12 with the coming of the Rehberg decision, which as I indicated  
13 really is not before me. That issue is going to have to be  
14 resolved before Judge Bianco.

15 Based on my reading of --

16 MR. WEINGARD: I'm sorry, Judge, who?

17 MS. PETILLO: Bianco.

18 THE COURT: Bianco.

19 MR. WEINGARD: Did you say Bianco?

20 THE COURT: Yes.

21 MR. WEINGARD: I thought I -- I must have misheard. I  
22 thought you said a different name.

23 THE COURT: My reading of Rehberg is such that I am  
24 going to stay any further discovery with regard to your client,  
25 Mr. Weingard, with one exception. That is at some point, he's

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1 going to be, I assume, called as witness in this case regardless  
2 of whatever else happens here. And so at a point in time where  
3 it would be necessary to take his deposition from a factual  
4 standpoint, I'm not going to preclude any of the parties from  
5 calling him as a witness in that regard.

6 He's not going to -- the scope of his testimony,  
7 obviously in that setting, would be limited, and certainly  
8 impacted by the other actions you're planning to undertake on  
9 his behalf. But we're not even at that point just yet.

10 MR. WEINGARD: May I just address that last thought,  
11 Judge?

12 THE COURT: Go ahead.

13 MR. WEINGARD: Again, conceptually, the whole reason  
14 for absolute immunity is so that as a party defendant currently,  
15 he not be put through depositions, discovery and various other  
16 items. There are cases --

17 THE COURT: You missed my point, Mr. Weingard.

18 MR. WEINGARD: Okay.

19 THE COURT: I just said I'm staying all discovery with  
20 regard to your client with the one exception --

21 MR. WEINGARD: But that's the important exception.

22 THE COURT: -- and that is as a fact witness. If he's  
23 a fact witness here, he's a fact witness. It's got nothing to  
24 do with his being sued as a Defendant in this case.

25 MR. WEINGARD: Will that --

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1 THE COURT: They may not call him at this point  
2 depending on what happens.

3 MR. WEINGARD: Will that await a determination on my  
4 application for dismissal predicated on absolute immunity?

5 THE COURT: Well, you can ask Judge Bianco for that,  
6 all right? That you want everything stayed as regards to your  
7 client. I'm not inclined to do that. I think if he's called as  
8 a witness here to the facts of this case to support the claims  
9 or defenses that are raised by co-defendants, frankly the issue  
10 of his testimony in the grand jury is a separate issue here than  
11 what he may know of the underlying facts that occurred in this  
12 case. And I don't think one -- I don't think he's precluded and  
13 absolved once and forever from this case even if your  
14 application is granted.

15 MR. WEINGARD: Well, assuming that's true and assuming  
16 he has to be called as a fact witness at some point, and  
17 assuming further that absolute immunity doesn't prevent that  
18 from occurring, and I'm not sure it doesn't, but let's make the  
19 assumption for the purpose of our discussion, that should not go  
20 on while he's still a party defendant in the action, because  
21 that would preclude absolute immunity for sure. That would  
22 impact absolute immunity for sure.

23 THE COURT: All right. Well, as I said, you're going  
24 to make an argument anyway to Judge Bianco, you can make that  
25 one as well, all right?

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1 MR. WEINGARD: Okay.

2 THE COURT: All right.

3 MR. WEINGARD: We certainly will.

4 THE COURT: All right.

5 MR. WEINGARD: So in the meantime if I get a notice of  
6 deposition, may we agree that that notice of deposition to my  
7 client not become effective until we understand what Judge  
8 Bianco's determination is?

9 THE COURT: That's fine. And I have no problem with  
10 that solution for the time being.

11 MR. WEINGARD: That's fine.

12 THE COURT: All right?

13 MR. WEINGARD: Yes.

14 THE COURT: But I do want to get to this issue of the  
15 grand jury minutes. So, if there's anything further you want to  
16 add in that regard, now is your chance.

17 MR. WEINGARD: Well, I think if my memory serves in  
18 Rehberg --

19 THE COURT: Yeah, I think my reading of Rehberg about  
20 the grand jury minutes and yours are not the same.

21 MR. WEINGARD: Well, let me try mine then.

22 THE COURT: Go ahead.

23 MR. WEINGARD: Okay. Hopefully I can persuade. May  
24 not, but I'll try.

25 THE COURT: No, I think with regard to the rest of

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1 this decision, I certainly think it obviously provides you with  
2 grounds to go back to Judge Bianco, all right?

3 MR. WEINGARD: Yes.

4 THE COURT: As to what Judge Alito said about the  
5 secrecy of the grand jury proceedings, I don't think I'm reading  
6 the same way you are.

7 MR. WEINGARD: Well, what he seems to be saying when  
8 he talks about one of the reasons that absolute immunity should  
9 apply with regard to grand jury witnesses, and let me just pull  
10 the -- he says that if you don't give absolute immunity in 1983  
11 litigation, it -- and I'm quoting now -- "subverts the grand  
12 jury secrecy." And then he goes onto observe that all a  
13 defendant, now plaintiff, would have to do is to start a 1983  
14 and then seek the transcripts of the grand jury.

15 The reason I'm suggesting that we put this over and  
16 hold is so that we don't have to meet that issue face to face  
17 right now, but rather we can hold that in abeyance, see whether  
18 or not I'm right, and I can get my client's absolute immunity  
19 taken care of. And see whether or not he then has to be subject  
20 to a party defendant EBT deposition.

21 I think if we argue this case now. Look, it's my  
22 pleasure; I'm here. But if we argue this case now, and for  
23 whatever the reason, Judge Bianco concludes that I'm correct I  
24 would think that that could impose additional problems on the  
25 parties. I think that the approach that I would suggest makes a

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1 lot of sense and that's why I'm advancing it. And as you know  
2 the County is also taking a position in the adjournment.

3 THE COURT: All right. And I'm denying the  
4 adjournment, so my question is do you wish to argue the motion  
5 further.

6 MR. WEINGARD: Sure.

7 THE COURT: Okay. Go ahead.

8 MR. WEINGARD: Thank you. These cases turn on  
9 particularized need. And this case is a particularly simple  
10 case factually as it relates to what occurred. We know that a  
11 number of police witnesses testified against my client during  
12 the course of a grand jury proceeding obtained transactional  
13 immunity and were never charged with any crimes. It was only my  
14 client who was charged with a crime.

15 And the nature of that crime is that he did not tell  
16 the truth when he claimed that he had safeguarded a gun that he  
17 had found. But rather the correct statement should have been  
18 that he was sent back to the car where the other occupants of  
19 the car were still located, and he stayed there while a  
20 different police officer from a different department located the  
21 gun. That was the nature of the perjury. I'm not minimizing  
22 it, but that was the nature of the perjury.

23 The fact, as I mentioned to you before, was that my  
24 client pleaded guilty to that perjury, which in all of the cases  
25 I've read starting with Briscoe and coming all the way up to

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1 Rehberg indicates that the safeguards placed in those cases is  
2 the perjury safeguard. You can always bring the grand jury  
3 witness or any other witness who testifies under oath before a  
4 court, charge him with perjury. That was done here.

5 What has happened is that we know that a bunch of  
6 police officers came in from Nassau County Police Department; we  
7 know that the other police department involved had a number of  
8 witnesses testify in connection with that. The only thing that  
9 we have access to, according to Judge Kase's decision under  
10 comity, as you will recall the way these cases work is that we  
11 have to go back to Nassau County, which we did.

12 THE COURT: Yes.

13 MR. WEINGARD: And Judge Kase has released -- not  
14 released. Judge Kase has told us that we are entitled to  
15 receive copies of our client's testimony only.

16 THE COURT: Mm-hm.

17 MR. WEINGARD: We have that. Not because we got it  
18 now, but because it was provided to us previously by the County  
19 Attorney's Office as I recall. We don't know whether or not the  
20 transcript has yet been prepared in connection with this.  
21 Because if it has, I would suggest that one way to deal with  
22 this might be for the judge, yourself, to examine this, and make  
23 a determination as to whether or not it would assist us in  
24 taking the depositions of all of the other witnesses who will be  
25 scheduled here. And this again assumes that my client -- and

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1 I'm not conceding this; my client would not be entitled to  
2 absolutely immunity. Or it may be that the County Attorney  
3 would want at some point to have that type of information. I  
4 know the Plaintiff now has asked for it.

5 I don't know how you can conceivably prepare this case  
6 without knowing what the testimony was before the grand juries,  
7 both grand juries. How could we prepare with regard to Coggins?  
8 And if indeed his passengers came before the grand jury under  
9 transactional immunity, which we believe occurred here, we would  
10 be entitled to explore that with them. And we'd have to know  
11 what they said before that grand jury.

12 I don't know if they were called. I know Coggins  
13 himself was called. And I do know that at some point or another  
14 all the police witnesses that I've identified to you were called  
15 before the second of the two grand juries involved.

16 My feeling here, and I don't know, I'm trying cases  
17 for 40 -- since 1965. I know what it takes for me to prepare a  
18 case, to ask witnesses appropriate questions. It seems logical  
19 to me that we have a particularized need to obtain those  
20 documents. And more importantly the Coggins matter has been  
21 dismissed; my client has pleaded guilty to perjury; there could  
22 be no retribution in connection with that. Vara has obtained  
23 and has complete transactional immunity.

24 Turning to the Coggins matter -- I'm sorry, to the  
25 Buonora matter, that has been over since '04 as I recall. And



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1 there are things that went on. My client's reinstated to the  
2 police department, and there is no harm that can be done to  
3 anyone. And given the nature of the particularized need here, I  
4 cannot understand how anybody would be harmed by a release by  
5 this court of the grand jury testimony to which we're addressing  
6 ourselves.

7 We're missing -- Mitchell, do you remember the number  
8 of -- excuse me, Judge. Do you remember the number of pages  
9 that we were missing? It was about 140 pages, and there were a  
10 bunch of pages?

11 MR. SENFT: I don't remember the numbers, but with the  
12 County discovery, there was an internal affairs report that  
13 included or I should say refers to the complete set of  
14 transcripts in the Coggins grand jury matter. And it showed  
15 page numbers whatever. There are at least a couple of thousand  
16 pages that were not provided. They provided the Coggins,  
17 Buonora and Vara transcripts, but clearly that was a fraction.  
18 The numbers are in their memo of law -- referenced in their memo  
19 of law.

20 THE COURT: Yes, I recall.

21 MR. SENFT: But it was a significant number. So, it  
22 was a significant number with heavy players and main players  
23 added up to whatever. There had to be a number of witnesses  
24 involved.

25 MR. WEINGARD: Thank you, Mitch.

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1 MR. SENFT: None of which were identified.

2 MR. WEINGARD: Thank you, Mitchell. So, we needed to  
3 prepare. No one gets harmed. Coggins is no longer a defendant;  
4 that case was dismissed. Buonora pleaded guilty to perjury.  
5 There is no harm that can conceivably be done.

6 And, yes, if my client is not granted absolutely  
7 immunity, I believe, and I know you read it differently, Judge,  
8 but I believe that I would be correct in saying that under those  
9 circumstances we're not organized crime to which that particular  
10 bench made reference; Judge Alito, as you pointed out, made  
11 reference, to what kind of harm can come from that secrecy if  
12 you violate. But this is not that case. This is not a case  
13 where we will harm anybody, anybody will be harmed. They know  
14 what they testified to. We're not asking for anything besides  
15 that particular grand jury information.

16 If Your Honor has no further questions?

17 THE COURT: No, I do not. Thank you. Mr. Calliste,  
18 do you want to be heard?

19 MR. CALLISTE: Yes, Your Honor, please. Briefly.

20 THE COURT: Excuse me?

21 MR. CALLISTE: Just briefly, Your Honor.

22 THE COURT: Go ahead.

23 MR. CALLISTE: We did join in the application of Mr.  
24 Weingard's office, and I believe that he essentially stated what  
25 my position would be in a nutshell. I just wanted to add to

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1 that, however, that as far as Plaintiff's case is concerned the  
2 central issue in the complaint is whether these Defendant  
3 officers subjected to Plaintiff to malicious prosecution under  
4 state law and under federal law.

5 And among other things, the complaint alleges that  
6 false statements were made to the grand jury and other things.  
7 We know that those issues have now been supported by the fact  
8 that there was an indictment against one of the police officers  
9 in this case and the actions that the police officer defendants  
10 actually took in both of the grand jury proceedings we believe  
11 are, for lack of a better word or way to describe it, is *res*  
12 *gestae*, Your Honor.

13 Because their actions before the grand jury are the  
14 central issue, we believe that there is now way for a jury or  
15 for a court to properly or intelligently evaluate anything that  
16 went on within the grand jury even though that was placed in  
17 issue with the complaint without actually having seen the grand  
18 jury testimony or evidence given to the grand jury. And I  
19 believe that that -- I'm sorry, Your Honor.

20 THE COURT: Sorry, go ahead. Finish.

21 MR. CALLISTE: And I believe that the supports our or  
22 at least Plaintiff's position for a particularized need because  
23 I believe that the grand jury testimony would actually be  
24 different than the testimony offered in this civil case.

25 THE COURT: And how is that? I mean just to play

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1 devil's advocate for a moment; why can't you get what you need  
2 from deposing these witnesses?

3 MR. CALLISTE: Well, Your Honor, the thing is that we  
4 don't necessarily know that at this point. We can't say that  
5 the Defendants will testify consistently or inconsistently. But  
6 what we do know is that applications have been made to the Court  
7 from the Defendants which at least state to some degree that  
8 their positions are not adverse to each other. And we know that  
9 applications were made to the Court by the Defendant Buonora  
10 where the County Attorney also supported the fact that there are  
11 conflicts with respect to testimony and things given.

12 THE COURT: So, you're not answering my question,  
13 though. Why can't you get that from taking depositions of these  
14 witnesses?

15 MR. CALLISTE: Your Honor, I mean obviously as I stand  
16 here, I can't say for sure one way or the other that we can't  
17 get that from these witnesses in deposition testimony. But to  
18 date we know that there's been some denial to some degree as to  
19 the allegations that Plaintiff made in his complaint, and we  
20 believe, as I stated, that because these statements are *res*  
21 *gestae* or what is contained in the grand jury proceedings,  
22 including statements by these Defendant officers, does qualify  
23 as *res gestae* I believe that that is the proper testimony to be  
24 before the jury for evaluation.

25 Whether there is testimony given in this case from the

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1 Defendants or not, if it's consistent to what they testified to  
2 in the grand jury, I'm pretty sure we can make an application to  
3 the Court for some sort of --

4 THE COURT: But if I adopt your theory then there's no  
5 need to bring any witnesses in here. You just get the grand  
6 jury testimony and give it over to a new jury.

7 MR. CALLISTE: Well, no, Your Honor, because I mean  
8 that doesn't -- from a procedural standpoint, that's not  
9 something that we can do, number one. And number two, I believe  
10 that, you know, whether it be for trying to prove out case on  
11 direct or for impeachment purposes that the grand jury testimony  
12 will actually be important for both purposes. So, we don't  
13 intend to offer the transcripts to the jury.

14 And I don't even think that that would be allowed  
15 under procedural rules/evidentiary rules for the federal court.  
16 But we do believe that it will be necessary not only with  
17 respect to our investigation -- with respect to asking questions  
18 during depositions, but in addition, we don't necessarily know  
19 what these officers testified to in the grand jury one way or  
20 the other. And --

21 THE COURT: Well, you know what Mr. Buonora testified  
22 to.

23 MR. CALLISTE: To a degree, Your Honor, yes, we do.

24 THE COURT: Okay. Anything else?

25 MR. CALLISTE: Your Honor, given -- well, we know that

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1 the Court places heavy reliance on the Rehberg decision, but I  
2 don't believe that there are other decisions that the Court  
3 should reference with respect to what our position is. For  
4 example, there's a case that we cited in our brief, the matter  
5 Palmer v. the Estate of Walwyn Stewart.

6 And that, Your Honor, was a Southern District case  
7 from the year 2004. The cite of that case we have as -- well,  
8 it's a Lexis cite. We have 2003 Lexis 9214. And against that's  
9 Southern District of New York from 2003. And in that case, the  
10 Court did actually allow -- by the way that case with facts  
11 similar to the allegations alleged by Plaintiff in this  
12 complaint. The Court in that case allowed the grand jury minutes  
13 to be disclosed -- to be released and unsealed because the  
14 allegations that plaintiff made particularly in his case dealt  
15 with statements and actions that took place before the grand  
16 jury in that case with respect to Defendant police officers. And  
17 the Court in that case citing to the case of Dale v. Bartels,  
18 532 F. Supp. 973, it's a case from '81, the Court --

19 THE COURT: No, I'm very familiar with that case. Go  
20 ahead.

21 MR. CALLISTE: Right. The Court in that case --  
22 essentially in the Dale case, the plaintiff requested grand jury  
23 minutes to show that false testimony provided by federal agents  
24 and officers in that case resulted in an indictment. And  
25 similar in this case -- well, in that case, the Dale case, the

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1 District Court granted the request, noting that the grand jury  
2 testimony, just as I said today, is *res*, or Your Honor, it's *res*  
3 evidence. And we believe that that is actually synonymous with  
4 this case here. Because as we allege once again, 50 percent of  
5 at least the central issue in this case involve actions that  
6 took place before the grand jury. We believe that those, just  
7 for that purpose alone, or at least the testimony of the police  
8 officers in this case, should be disclosed as there's a  
9 particularized need for it given the fact that the jury would  
10 not be able to make an intelligent decision in the event that  
11 this case goes to trial without having evaluated what the police  
12 officers testified to here in court during depositions, as well  
13 as, what they testified to at the grand jury, which is the  
14 central issue in this case.

15 THE COURT: All right. Thank you. Ms. Petillo, you  
16 want to be heard?

17 MS. PETILLO: Yes, please, Your Honor. At this point  
18 it's clear to the Court that you know what Defendant Buonora  
19 testified to, as there was the result of a perjury plea  
20 resulting from his testimony. With respect to other witnesses,  
21 Officers Okochino (ph) and Barnage (ph) testified on February 25  
22 of 2010, were specifically asked if they testified at the grand  
23 jury to which they said no. It is our position that this is  
24 premature. All I'm hearing so far is we need it according to  
25 Defendant Buonora and according to the Plaintiff to refresh

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1 recollection; to impeach witnesses. There's been no indication  
2 at this point that anyone's recollection needs to be refresh.

3           Until such time as someone comes in and says I can't  
4 remember what I testified to; I don't remember if I testified;  
5 you know what the subject matter was; or until such time there's  
6 a reason to impeach someone -- if someone comes in and says no,  
7 I never testified, then they may raise an issue as to whether or  
8 not the grand jury minutes should be unsealed. But until such  
9 time as that occurs, they are statutorily sealed for a reason.  
10 And I don't believe that the showing of impeachment or  
11 refreshing recollection is a valid reason at this juncture to  
12 unseal the grand jury minutes. There's been no showing that  
13 that's necessary. Any information that needs to be obtained  
14 regarding what someone testified to can be obtained through  
15 depositions.

16           Plaintiff also makes an argument that because the  
17 passengers in the vehicle were noticed or their information  
18 given out in initial disclosures, that they don't have an  
19 expectation of secrecy. Our position is that that is ludicrous.  
20 When they testified before the grand jury, it was under the  
21 assurance that it would be secret. To turnaround and out them  
22 for the purposes of a federal civil rights claim that they have  
23 no connection with, they're not parties to, I think is improper.  
24 I think it defeats the grand jury, and I think it's a dangerous  
25 precedent to set at this moment.



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1 THE COURT: Thank you.

2 MR. PETILLO: Thank you.

3 MR. WEINGARD: May I have a moment to respond just to  
4 that?

5 THE COURT: Yes.

6 MR. WEINGARD: And to one other thing, please. The  
7 Plaintiff was claiming that there's a malicious prosecution  
8 aspect of all of this as it relates to the grand jury proceeding  
9 and that Rehberg doesn't deal with that. You will recall that  
10 Judge Alito or Justice Alito in making his determination  
11 specifically went through all of the secondary issues that can  
12 arise --

13 THE COURT: Yes.

14 MR. WEINGARD: -- as a result of the testimony before  
15 the grand jury. And that they would all be subject to immunity,  
16 absolute. And the reason for that is that you could very easily  
17 just skirt absolute immunity by making these secondary claims  
18 under a civil rights' case. And for that reason -- I know I'm  
19 arguing Rehberg back to you again, but I think it's important as  
20 it relates to the question of where that particular decision  
21 went; how broad it was.

22 I've read a lot of these over the course of the last  
23 six years. I want to tell you something; I've never seen a  
24 broader case than this particular one dealing with all of the  
25 conflicts in the circuits and the reasons that the Court went

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1 into this in such detail, the definition of complaining witness  
2 and so forth. I will raise all of this of course at the  
3 appropriate time, but I didn't think it appropriate, even though  
4 we're on the same side in trying to get these records, to use  
5 secondary issues, which would also be called quelled if absolute  
6 immunity is granted as a theory upon which to get the records.  
7 And that is why I sought an adjournment *sine die* until we could  
8 get this resolved.

9 THE COURT: All right. Thank you. I'm going to take  
10 a very short five minute recess, and I will be right back. All  
11 right?

12 MS. PETILLO: Thank you, Your Honor.

13 MR. WEINGARD: Thank you.

14 (Off the record.)

15 THE COURT: As to the pending motion. Presently  
16 before the Court is Defendant Craig Buonora's motion for an  
17 order pursuant to Rule 26(b)(1) of the Federal Rules of Civil  
18 Procedure directing the unsealing and production of the grand  
19 jury minutes with respect to the cases People v. Coggins and  
20 People v. Buonora. That motion has been joined in by  
21 Plaintiff's counsel in this action.

22 The incident giving rise to this case occurred October  
23 9 of 2004 when Darryl T. Coggins was pulled over while driving  
24 his car by Nassau County Police Officer, James Vara. Both  
25 parties acknowledged that after Vara radioed for assistance

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1 Nassau County Police Officer, Craig Buonora, arrived at the  
2 scene. Shortly after Buonora arrived at the scene, Coggins fled  
3 on foot. Although Coggins was not apprehended after he fled, he  
4 later surrendered at the Nassau County Police Department Third  
5 Precinct and was subsequently arrested.

6 On March 17, 2005, a grand jury indicted Coggins on  
7 two counts of criminal possession of a weapon in a third degree,  
8 and also for resisting arrest. However it was later revealed  
9 that Defendant Buonora falsely testified before the grand jury  
10 that he had located a pistol near the fence Coggins jumped over  
11 and that he secured the gun until he was relieved by a Floral  
12 Park police officer. As a result of this false testimony, the  
13 case against Coggins was voluntarily dismissed by the Nassau  
14 County District Attorney's Office on August 9 of 2005. After  
15 being indicted Defendant Buonora pled guilty to perjury on  
16 October 11, 2005.

17 On August 27 of 2007, Coggins commenced this action  
18 against Defendants Nassau County, the Nassau County Police  
19 Department, Vara, Buonora, Sergeant Pickering, Lieutenant  
20 Dilargi (ph), and John Does 1 through 10, pursuant to 42 U.S.C.  
21 Sections 1981 and 1983, alleging violations of his  
22 constitutional rights under the Fourth, Fifth, Sixth and  
23 Fourteenth Amendments. The Plaintiff also has brought various  
24 New York State claims, including fraudulent misrepresentation,  
25 malicious prosecution, false arrest and negligence. The

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1 complaint was twice amended by the Plaintiff, first on August 19  
2 of 2008 and then again on April 14 of 2011. The second amended  
3 complaint filed on April 14, of 2011, is the operative pleading  
4 now in this action.

5 According to the Plaintiff, from October 9, 2004  
6 through August 12 of 2005, he was "falsely accused, falsely  
7 charged, falsely arrested, falsely detained, falsely jailed, and  
8 abusively prosecuted by the Defendants." Significant to the  
9 present motion is the Plaintiff's allegations that Defendants  
10 Vara and Buonora "actively instigated and encouraged the  
11 baseless prosecution of the Plaintiff" and that the indictment  
12 "was based primarily on the testimony" of Vara and Buonora "as  
13 complaining witnesses."

14 On January 24, 2008, Defendant Buonora moved for  
15 summary judgment under Rule 56, or in the alternative to dismiss  
16 the complaint under Rule 12(b)(6). Finding Defendant Buonora's  
17 motion for summary judgment premature, Judge Bianco dismissed  
18 the motion without prejudice and with the right to renew at the  
19 close of discovery. Judge Bianco also denied Defendant  
20 Buonora's motion to dismiss the complaint on the grounds that he  
21 is entitled to absolute immunity.

22 Specifically, Judge Bianco determined that one, the  
23 Court cannot determine at this juncture, as a matter of law,  
24 whether Buonora served as a "complaining witness" in Coggins'  
25 prosecution; and two, the complaint alleges an extra-judicial

1 conspiracy to commit perjury.

2           On March 30, 2012, Defendant Buonora filed the instant  
3 motion seeking to have the grand jury materials of People v.  
4 Coggins and People v. Buonora unsealed and produced. It is  
5 undisputed that Buonora was provided during prior motion  
6 practice in this action with portions of the transcript from the  
7 Coggins' grand jury, including the full testimony of himself,  
8 Coggins and Officer Vara.

9           Defendant Buonora is now seeking additional testimony  
10 from the Coggins' grand jury, as well as the full minutes from  
11 the Buonora grand jury. Defendant Buonora represents that the  
12 testimony from Coggins, Buonora, and Vara from the Coggins grand  
13 jury consists of approximately 72 pages. However, Defendant  
14 Buonora contends that the index to the internal affairs' report  
15 indicated that the grand jury transcript from People v. Coggins  
16 consisted of at least 130 pages. Therefore Defendant Buonora  
17 seeks the 60 or so additional pages that constitute the full  
18 grand jury transcript.

19           Comparing the rules which apply here, when a party  
20 requests disclosure of matters that occurred before a federal  
21 grand jury Rule 6(e) of the Federal Rules of Criminal Procedure  
22 protects disclosure of grand jury minutes and governs the  
23 circumstances under which grand jury material may be released.  
24 See In re Grand Jury Subpoena, 103 F.3d 234 at 239 (2<sup>nd</sup> Circuit,  
25 1996).

1 Rule 6(e) states that "The Court may authorize  
2 disclosure at a time in a manner and subject to any other  
3 conditions that it directs of a grand jury matter preliminary to  
4 or connection with a judicial proceeding." Under this rule  
5 grand jury proceedings receive a rebuttal presumption of  
6 secrecy. See again, In re Grand Jury Subpoena at Page 239.

7 The burden is on the party seeking the grand jury  
8 material to show a "particularized need" for the information in  
9 the grand jury minutes that outweighs the need for secrecy of  
10 grand jury proceedings. See Ruther v. Boyle, 879 F.Supp 247 at  
11 250, (E.D.N.Y., 1995), stating that because of the time honored  
12 policy and strong public interest in maintaining grand jury  
13 secrecy, the United States Supreme Court has consistently held  
14 that a strong showing of particularized need is required before  
15 any grand jury materials can be disclosed.

16 In order to show a particularized need, the moving  
17 party must demonstrate that the materials sought "is needed to  
18 avoid a possible injustice in another judicial proceeding; that  
19 the need for disclosure is greater than the need for continued  
20 secrecy; and that its request is structured to cover only  
21 materials so needed." That's from Douglas Oil Company of  
22 California v. Petrostops NW, 441, U.S. 211, a Supreme Court case  
23 from 1979. See also Cullen v. Margiotta, 811 F.2d 698 at 715, a  
24 Second Circuit case from 1987 with which people I assume are  
25 very familiar which is overruled on other grounds in Agency

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1 Holding Corp. v. Malley Duff & Associates, 483 U.S. 143, a 1987  
2 decision of the Supreme Court.

3 "Analysis of the need for disclosure of grand jury  
4 materials must necessarily take into account the specific needs  
5 of a given case." That's from Zomber v. Village of Garden City,  
6 2011 WL 3511011, at \*3 (E.D.N.Y. Aug. 10, 2011).

7 Moreover a Court is "infused with substantial  
8 discretion" when balancing the interest of a particularized need  
9 with the importance of secrecy in grand jury proceedings.  
10 That's from Douglas Oil at 441 U.S. at 223. Although both grand  
11 juries at issue here were conducted in state court, New York  
12 State Law does not govern discoverability and confidentiality in  
13 federal civil rights actions. See King v. Conde, 121 F.R.D. 180  
14 at 187 E.D.N.Y. 1988).

15 The Court notes, however, that the same tests which  
16 evaluates whether a particularized need outweighs the importance  
17 of grand jury secrecy in federal grand jury proceedings has also  
18 been applied with respect to state grand jury proceedings. See  
19 for example Cherry v. Rodenberg, 2008 WL 4610302 at \*2, an  
20 October 15, 2008 decision from the Eastern District; Myers v.  
21 Phillips, 2007 WL 2276388 at \*2, an August 7, 2007 decision from  
22 the East District; and Palmer v. Estate of Stewart, 2004 WL  
23 2429806 at \*3, (S.D.N.Y., November 1, 2004).

24 As a matter comity, however, the movant must first  
25 make an application to unseal the grand jury minutes to the

1 State Court which oversaw the proceedings of the relevant grand  
2 jury. See Felmine v. City of New York, 2009 WL 3526486, at \*1  
3 (E.D.N.Y. Oct. 29, 2009), in which the court found that refusing  
4 to decide whether plaintiff had presented a particularized need  
5 until the plaintiff made an application to have the grand jury  
6 minutes unsealed. And the same court was the appropriate  
7 method. See Ruther 879 F.Supp at 250-51, which stands for the  
8 same proposition, as well as Douglas Oil, 441 U.S. at 226. In  
9 Douglas Oil, the court stated "in general requests for  
10 disclosure of grand jury transcripts should be directed to the  
11 court that supervised the grand jury's activities." See also  
12 Cherry, 2008 WL 4610302 at \*2.

13 Before a federal court can consider whether a  
14 particularized need has been established, the movant must first  
15 make an application to unseal the grand jury minutes in the  
16 state court that supervised the grand jury at issue. Prior to  
17 making the present motion, Defendant Buonora moved in the Nassau  
18 County Supreme Court for an order directing the unsealing of the  
19 minutes of the grand jury proceedings in both People v. Coggins  
20 and People v. Buonora. On November 4, 2011, Judge Kase granted  
21 the motion in part and denied it in part.

22 Judge Kase found that Defendant Buonora "failed to  
23 demonstrate how the disclosure of the grand jury testimony is  
24 necessary so as to present a compelling and particularized  
25 need." However, Judge Kase ruled that Defendant Buonora's own



1 testimony in the Coggins grand jury "may be disclosed as the  
2 very words as well as the substance of his testimony constitutes  
3 the res of the perjury charge." With this one exception, the  
4 grand jury testimony from the Coggins grand jury and the Buonora  
5 grand jury remains sealed.

6 One of the arguments proffered by the Nassau County  
7 Defendants against unsealing the remaining minutes is that this  
8 Court should take judicial notice under federal rule of evidence  
9 201(a) of the state court's decision denying Buonora's request  
10 to unseal the grand jury minutes. As an initial matter, Rule  
11 201(a) allows the Court to take judicial notice of a fact that  
12 is not subject to reasonable dispute, but not legal conclusions.

13 In any event, this argument runs contra to particular  
14 case law which specifically allows for a party challenge the  
15 state court's decision in federal court. See Ruther 879 F.Supp  
16 251 in which the court stated "If after reviewing a parties'  
17 application, the state court supervising the grand jury decides  
18 that secrecy of the grand jury proceedings is still warranted  
19 the party may challenge the state court's decision before this  
20 court."

21 See also Palmer 2004 WL 2429806 at \*2 stating that  
22 "the requirement that plaintiffs first seek disclosure through  
23 the avenues available to them in the state court does not give  
24 the state courts a veto over disclosure in a federal civil  
25 rights case." Since Defendant Buonora was denied access to the

1 requested grand jury materials by the state court, he may now  
2 challenge the state court's decision here in federal court. To  
3 demonstrate a particularized need, Defendant Buonora must first  
4 demonstrate that the materials sought are needed to avoid an  
5 injustice in this action.

6 As was the case in the motion before the state court,  
7 Defendant Buonora essentially asserts three grounds for  
8 unsealing the grand jury materials. Defendant Buonora first  
9 argues that disclosure of the grand jury materials is necessary  
10 to establish that he is entitled to absolute immunity and  
11 thereby avoid the injustice that would result if he had to  
12 defend himself in a civil law suit. In particular, Defendant  
13 Buonora maintains that the grand jury materials will demonstrate  
14 that he was not a complaining witness in this procedure, nor was  
15 he involved in an extra-judicial conspiracy to commit perjury.

16 In Briscoe v. LaHue, 460 U.S. 325, a 1983 decision of  
17 the Supreme Court, the Court held that 42 U.S.C. Section 1983  
18 does not authorize a convicted individual to assert a claim for  
19 damages against a police officer for giving perjured testimony  
20 at his criminal trial. That's Briscoe at Page 326.

21 The second circuit subsequently broadened "Briscoe  
22 grants of absolute immunity" to cover perjurious testimony  
23 during grand juries. See San Filippo v. U.S. Trust Co., 737  
24 F.2d 246, 254 (2d Cir. 1984). However, the second circuit also  
25 elucidated an important distinction between two categories of

1 witnesses with respect to the immunity afforded to them when  
2 false testimony is offered. See White v. Frank, 855, F.2d, 956,  
3 958 (2d Cir. 1988) in which the court stated "Those witnesses  
4 whose role was limited to providing testimony enjoyed immunity,  
5 while those who played a role in initiating prosecution, i.e.  
6 complaining witnesses, did not enjoy immunity." That's from  
7 pages 958 and 959 of the Frank case.

8 See also Manganiello v. City of New York, 2008 WL  
9 2358922 at \*7 (S.D.N.Y., June 10, 2008) in which the court  
10 stated "A complaining witness is one who actively investigated  
11 or encouraged the prosecution of the plaintiff." Therefore, "an  
12 officer who participates in initiating a baseless prosecution by  
13 testifying to the grand jury is encompassed by the exclusion for  
14 complaining witnesses and therefore cannot receive absolute  
15 immunity but may receive qualified immunity." That's from  
16 Zomber 2011 WL 3511011 at \*3 (citing Sclafani v. Spitzer, 734  
17 F.Supp.2d 288, 296 (E.D.N.Y. 2010)).

18 While broadening the scope of absolute immunity in  
19 certain instances, the second circuit also qualified the  
20 "Briscoe grants" of absolute immunity with respect to those  
21 witnesses who engage in extra-judicial conspiracies to provide  
22 false testimony. See San Filippo, 737 F.2d at 255 in which the  
23 court stated "Briscoe v. LaHue was expressly limited to immunity  
24 for testimony given in judicial proceedings and it's rationale  
25 to encourage witnesses to come forward with all they knew, does

1 not justify extending that immunity to cover extra-judicial  
2 conspiracies between witnesses." The second circuit explicitly  
3 confirmed that the "extra-judicial conspiracy exception" applies  
4 to police officer defendants. See Dory v. Ryan, 25 F.3d 81 at  
5 Page 84 (2d Cir. 1994) in which the Court said there's reason to  
6 distinction police officers from other witnesses with regard to  
7 the extra-judicial conspiracy exception.

8 Having looked at the Rehberg v. Paulk case from the  
9 Supreme Court, which was handed down on April 2, cited at 132  
10 Supreme Court 1497, there is a real issue as to the second  
11 circuit's delineations here being called into question. The  
12 Defendant argues that first of all that Rehberg has eviscerated  
13 these two exceptions. Whether that is the case, is something  
14 that will be played out now before Judge Bianco in counsel's net  
15 application. Whether Defendant Buonora ultimately is dismissed  
16 from this law suit, actually has no relevance to why the grand  
17 jury materials are needed to support his defenses as they are  
18 presently articulated.

19 The Court finds that Defendant Buonora's conclusory  
20 statement that the grand jury materials are necessary to prove  
21 his entitlement to absolute immunity falls short of the  
22 particularized need, a party seeking to unseal grand jury  
23 minutes must demonstrate. And really I see these as two  
24 separate issues. See United States v. Cusmage, 2008 WL 4561603  
25 at \*5 (W.D.N.Y., October 10, 2008) in which the court stated

1 "Merely stating the desire to make a vigorous defense in  
2 general, does not show a particular need for a given portion of  
3 the grand jury testimony."

4 Defendant Buonora fails to proffer even a single  
5 example of how the grand jury materials not already in his  
6 possession are necessary for proving his defense of absolute  
7 immunity. See Rex Shaffer v. City of New York, 2009 WL 773351  
8 at \*4 (S.D.N.Y., March 18, 2009) case in which the court stated  
9 "A mere possibility of benefit does not satisfy the required  
10 showing of particularized need."

11 For example, the complaint alleges that Officers Vara  
12 And Buonora conspired to commit perjury during Coggins grand  
13 jury proceeding. No one other than Vara and Buonora are  
14 asserted as participants in the alleged extra-judicial  
15 conspiracy. The Court does not see, and Buonora does not  
16 explain how the grand jury testimony of anyone other than Vara  
17 and Buonora is necessary. Likewise, the Court fails to see how  
18 Buonora's ability to show that he is not a complaining witness  
19 is somehow contingent on the full grand jury transcript,  
20 particularly now in light of Rehberg. See Zomber 2011 WL  
21 3511011 at \*5 in which the court found no particularized need  
22 where the parties, who already had access to the grand jury  
23 testimony of the Defendant officer, as well as two other  
24 officers, asserted that the full grand jury minutes were needed  
25 to determine whether the Defendant officer was a complaining

1 witness.

2 Defendant Buonora next argues that notwithstanding his  
3 perjury, other grand jury witnesses testified dishonestly  
4 against him and therefore the grand jury materials are  
5 "essential and indispensable" for demonstrating that fact.  
6 Aside for alleging this purported need, Defendant Buonora does  
7 not explain how the fact that the grand jury witnesses may have  
8 testified dishonestly, has any impact on his ability defend  
9 himself in this case. Even if the Court accepts as true,  
10 Defendant Buonora's contention that others testified dishonestly  
11 against him during the Buonora grand jury the Court fails to see  
12 its impact in this action since Buonora pled guilty to perjury  
13 notwithstanding what may or may not have occurred in the grand  
14 jury.

15 The Court finds Defendant Buonora's assertion that the  
16 grand jury witnesses testified dishonestly to be lacking in  
17 foundation since the Defendant has no factual basis to even  
18 ascertain who the witnesses were who testified at the Buonora  
19 grand jury. Moreover, Defendant Buonora's rationale that Vara  
20 and possibly other witnesses were granted transactional immunity  
21 means that they necessarily testified falsely against him is a  
22 faulty and unsupported premise. At most such information may  
23 arguably relevant to this action, but a showing of relevance  
24 itself is not enough. See Rex Shaffer, 2009 WL 773351 at \*2 in  
25 which the court stated "A particularized need for grand jury

1 testimony must be demonstrated by more than a mere showing that  
2 such material is relevant".

3 Lastly, Defendant Buonora contends that the grand jury  
4 testimony of all of the witnesses is needed to question them  
5 fully and to refresh their recollections and/or impeach their  
6 testimony. "A desire to use grand jury transcripts to refresh a  
7 witness' recollection or to impeach or otherwise test the  
8 credibility of witnesses in subsequent proceeding can under  
9 certain circumstances rise to the particularized need required  
10 for disclosure." That's from *Velasquez v. City of New York*,  
11 1997 WL 736698 at \*1, (S.D.N.Y., November 28, 1997).

12 See also *In re Federal Grand Jury Proceeding*, 760 F.2d  
13 436 at 439 (2d Cir. 1985) in which the court states that  
14 impeachment can rise to the level of particularized need. The  
15 second circuit has cautioned that "an asserted desire to cross  
16 examine effectively however, should not give a Petitioner  
17 license to page through grand jury minutes. A much more  
18 particularized more discreet showing of need is necessary."  
19 That's from *In re Federal Grand Jury Proceedings*, 760 F.2d 439  
20 (quoting *United States v. Procter and Gamble*, 356 U.S. 677).

21 See also *Waterman v. City of New York*, 1998 WL 23219  
22 at \*2 (S.D.N.Y., January 13, 1998) in which the court found that  
23 "Mere invocation of impeach needs" does not automatically  
24 demonstrate a particularized need. Therefore, "district courts  
25 have repeatedly declined to permit disclosure of grand jury

1 material without a showing of a witness' inability to remember  
2 events at a subsequent proceeding or actual inconsistencies  
3 between the grand jury testimony and subsequent testimony."  
4 That's from Velasquez, 1997 WL 736698 at \*1. Accord Waterman  
5 1998 WL 23219 at \*2.

6 Defendant Buonora claims that since the subject  
7 incident occurred in October 2004 and the respective grand  
8 juries occurred in March 2005 and September 2005, recollection  
9 of the events at issue were fresher and more complete at the  
10 time of the grand jury proceedings than they necessarily would  
11 be at the time of depositions in this case. It is Defendant  
12 Buonora's position therefore that the use of the grand jury  
13 minutes for refreshing recollections and impeaching witnesses  
14 can result in more accurate fact finding.

15 The Court notes that the speculative nature of the  
16 Defendant Buonora's argument is evident from his own papers as  
17 he argues that the grand jury minutes can result in more  
18 accurate fact finding. Other than the mere passage of time,  
19 Defendant Buonora has not shown or even suggested that there is  
20 any reason to expect that any of the witnesses to be deposed  
21 will not testify accurately or be able to recall material facts  
22 of this case.

23 See Rex Shaffer v. City of New York, 2009 WL 773351 at  
24 \*5 finding no particularized need where the Plaintiffs "have  
25 failed to specify precisely why they need the prior testimony



1 for impeachment or for refreshing recollection." See also  
2 Waterman 1998 WL 23219 at \*2, holding no particularized need  
3 demonstrated where Plaintiff "offers only his speculation that  
4 impeachment materials might be found in the grand jury minutes."

5 Since depositions have not yet been conducted in this  
6 action, Defendant Buonora has not articulated any basis for the  
7 assertion that impeachment materials will be found in the  
8 minutes of the grand jury proceedings. Defendant Buonora's  
9 reliance in addition on of Dale v. Bartels, 532 F. Supp. 973,  
10 Southern District 1982, is misplaced. In Dale, the Plaintiff  
11 alleged that certain unknown Defendants through false statements  
12 to a grand jury caused an indictment to issue against the  
13 plaintiff. The Court in granting the plaintiff's motion to  
14 obtain the grand jury testimony noted that "This is not a case  
15 where the ultimate facts testified to before the grand jury,  
16 although relevant to a law suit, can be obtained by a litigant  
17 from the same original source, i.e. witnesses having knowledge.  
18 In this case the grand jury testimony is the *res* itself, the  
19 subject matter of this part of the law suit. What is relevant  
20 here is not the underlying facts testified to, but the content  
21 of the testimony itself. The grand jury testimony itself is  
22 what this case in this aspect is all about." That's at Dale,  
23 pages 976, 977.

24 The present circumstances differ substantially from  
25 Dale in that the additional grand jury testimony sought by

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1 Defendant Buonora is not the res itself. While the testimony of  
2 Vara and Buonora during the Coggins grand jury could arguably be  
3 considered the res of this law suit since the Plaintiff's claims  
4 are premised in part on the Defendant's false testimony, the  
5 same cannot be said for the remaining grand jury testimony.

6 Again, as I've already stated, the parties here have  
7 the testimony of Coggins, Buonora and Vara in the Coggins grand  
8 jury. The facts that were testified to before the grand juries  
9 from the other witnesses, such as, other police officers and  
10 plaintiff's passengers, can be obtained from these individuals  
11 at their depositions. Therefore, unlike the movant in Dale  
12 Buonora has not shown that he is seeking something other than  
13 the underlying facts testified to during the grand juries.

14 Based on the above information, the Court finds that  
15 such speculation and generalizations do not suffice to establish  
16 the more discreet showing of need required for disclosure.  
17 Going to the balancing of needs here, in order to demonstrate a  
18 particularized need for grand jury materials a plaintiff must  
19 also show that his need for disclosure outweighs the need for  
20 grand jury secrecy.

21 In balancing those needs, the Supreme Court has  
22 identified several interests that are preserved by grand jury  
23 confidentiality. Looking at Douglas Oil in particular the court  
24 stated "First, if pre-indictment proceedings were made public,  
25 many perspective witnesses would be hesitant to come forward

1 voluntarily knowing that those against whom they testified would  
2 be aware of that ,testimony.

3 Moreover, witnesses who appear before the grand jury  
4 would be less likely to testify fully and frankly as they would  
5 be open to retribution, as well as to inducements. There also  
6 would be the risk that those about to be indicted would flee or  
7 would try to influence individual grand jurors to vote against  
8 indictment.

9 Finally, by preserving the secrecy of the proceedings,  
10 we assure that persons who are accused but exonerated by the  
11 grand jury will not be held up to public ridicule."

12 In this case, the Court is cognizant of the fact that  
13 the need for grand jury secrecy is somewhat less, because "there  
14 is no ongoing criminal investigation or prosecution, and because  
15 the witnesses are public servants who appear regularly before  
16 grand juries and in court. As that statement has been defined  
17 in Al Herado v. the City of New York, 2009 WL 510813 at \*2 note  
18 2. (E.D.N.Y., February 27, 2009). See also Palmer 2004 WL  
19 2429806 at \*5 concluding that the officer's interest in secrecy  
20 is at its lowest giving that testifying before a grand juries is  
21 part of their regular job duties as public servants.

22 While these facts reduce the need associated with  
23 grand jury secrecy, the need is never eliminated in its  
24 entirety. See Zomber 2011 WL 3511011 at \*3 and Myers 2007 WL  
25 2276388 at \*4. Therefore Defendant Buonora is still responsible

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1 for coming forward with some necessity for having the grand jury  
2 materials disclosed.

3 As noted here he has not articulated why the grand  
4 jury materials are necessary to avoid an injustice in this  
5 action. Therefore the Court concludes that plaintiff's alleged  
6 need for the grand jury materials is outweighed by the  
7 presumption of secrecy afforded to grand jury proceedings.

8 And I know that Defendant Buonora's counsel is relying  
9 on the Rehberg case as a support for his argument that the  
10 minutes should be released. And as I've indicated, I  
11 respectfully disagree with the reading in Rehberg to that  
12 affect, particularly where Justice Alito states the following:

13 We have consistently recognized that the proper  
14 functioning of our grand jury system depends upon the secrecy of  
15 grand jury proceedings. Allowing Section 1983 actions against  
16 grand jury witnesses would compromise this vital secrecy. If  
17 the testimony of witnesses before a grand jury could provide the  
18 basis for or could be used as evidence, supporting a Section  
19 1983 claim, the identities of grand jury witnesses could be  
20 discovered by filing a Section 1983 action and moving for the  
21 disclosure of the transcript of grand jury proceedings.

22 Especially in cases involving violent criminal organizations or  
23 other subjects who might retaliate against adverse grand jury  
24 witnesses, the threat of such disclosure might seriously  
25 undermine the grand jury process.

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1           In my mind looking at that section, although the judge  
2 is -- the justice is giving several examples, this was certainly  
3 not exclusive of the field that I believe supports the court's  
4 position that the these minutes should remain secret.

5           For the reasons discussed here, Defendant Buonora has  
6 not demonstrated a particularized need for the grand jury  
7 testimony and the motion therefore to unseal the grand jury  
8 minutes is hereby denied.

9           Counsel, you certainly have your appeal rights to  
10 Judge Bianco under the rules. All right?

11           MR. WEINGARD: Judge, may I just make one other  
12 suggestion? I raised it very briefly. While I understand Your  
13 Honor's decision in not releasing the grand jury testimony to  
14 any of the parties at the present time, I suggested earlier that  
15 perhaps you could review that in-camera and make your decision  
16 based upon what you actually will see. And you know enough  
17 about this case to determine whether or not we will have  
18 particularized needs if that's the case.

19           THE COURT: Well, I think to some extent that  
20 substitutes my doing your job, and with all due respect, I'm  
21 going to decline that. All right? And once again, you can  
22 certainly take that issue up if you wish to with Judge Bianco.

23           MR. WEINGARD: Thank you. And I just want to make  
24 clear one other thing. When you said you were staying all  
25 discovery, I think I heard you say when I asked you about

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1 Buonora, that you would stay it until Judge Bianco has had the  
2 opportunity to pass on my application?

3 THE COURT: Well, I certainly will stay it until he's  
4 had a chance to hear your application.

5 MR. WEINGARD: Okay.

6 THE COURT: And to get his response to that. All  
7 right? I don't necessarily intend to wait until he renders a  
8 formal decision. All right? But you certainly should address  
9 that with him.

10 MR. WEINGARD: I assume that would involve a  
11 conference between yourself and Judge Bianco at some moment?

12 THE COURT: It may at some point.

13 MR. WEINGARD: Understood. And the last thing is,  
14 will we get a copy of your decision. My intention at this point  
15 is just to put up a short order saying for the reasons I've  
16 stated in the record today. You're certainly free to get a  
17 transcript if you wish to. All right?

18 MR. WEINGARD: Thank you, Your Honor.

19 MR. CALLISTE: Your Honor? Your Honor?

20 THE COURT: we're not finished yet, so just bear with  
21 me.

22 MR. CALLISTE: All right.

23 THE COURT: All right. And just so the record is  
24 clear, when we had this earlier conversation about stays vis-à-  
25 vis Defendant Buonora, what I've said essentially is based on my

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1 reading of the Rehberg case, I certainly believe you have the  
2 right to go back to raise the issues that you're raising to  
3 Judge Bianco with regard to the absolute immunity defense. What  
4 I said was I was prepared to stay discovery against Defendant  
5 Buonora with the exception of any fact deposition that other  
6 parties wish to take here, because notwithstanding what happens  
7 to him even if he's out of the suit on absolute immunity  
8 grounds, I still do not see how he could not be a fact witness  
9 at a deposition if indeed the other parties decide to call him.

10 You're certainly free to bring that up to Judge  
11 Bianco. But I think what you've requested is a full stay. I'm  
12 not granting you a full stay --

13 MR. WEINGARD: Well, no. I --

14 THE COURT: -- but you can certainly address the full  
15 stay to Judge Bianco.

16 MR. WEINGARD: Yes.

17 THE COURT: All right?

18 MR. WEINGARD: Yes, I understand that. But for the  
19 moment, nothing will happen until I've had the opportunity to  
20 make that --

21 THE COURT: To bring that --

22 MR. WEINGARD: -- application.

23 THE COURT: -- That's right. To make that application  
24 to Judge Bianco. All right?

25 MR. WEINGARD: I understand.

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1 THE COURT: All right.

2 MR. WEINGARD: And I appreciate the clarification.

3 THE COURT: All right. We have some other issues to  
4 resolve here, so let me get to that now.

5 MR. WEINGARD: Judge, with whom shall I make the  
6 arrangements to get a copy of your decision?

7 THE COURT: You can speak to my courtroom deputy, all  
8 right? When we conclude here. All right?

9 All right. As far as discovery in this case is  
10 concerned, and the flurry of materials that were submitted here,  
11 at one point I had directed the parties to have a meet and  
12 confer to try to work out the issues here. And apparently that  
13 may or may not have -- it may have been successful on some  
14 counts, but certainly not on others. The problem I have here is  
15 the manner in which these requests were submitted. And here's  
16 what I'm going to do.

17 First of all with regard to claims that people didn't  
18 respond thoroughly, sufficiently or appropriately to discovery  
19 demands, whether they're interrogatories or document demands,  
20 you can't just submit a letter that says these folks didn't  
21 respond to 6, 7, 8, 10 and 14 correctly. We have a local rule  
22 that governs here. The local rule is 37.1. That means if you  
23 want a ruling from me on a discovery dispute, you've got to give  
24 me the original demand that was made, the verbatim response that  
25 you got from the other side and underneath that, your objections



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1 and why you think you're entitled to relief. If I don't get it  
2 in that format, I'm not ruling on it. So, whatever submissions  
3 have been made in the form up until now as motions, I'm denying  
4 them without prejudice. And you'll resubmit them if you wish to  
5 in compliance with Rule 37.1. That is the one area in which  
6 I've granted people an exception to my three page limitation on  
7 letter motions. So if you need to make such a motion, you'll  
8 have whatever room you need to encompass those specifics. All  
9 right? That's number one.

10 MR. WEINGARD: But of course that is subject to the  
11 stay you currently have in effect?

12 THE COURT: That's correct. With regard to the other  
13 parties in this case and carving out Defendant Buonora for the  
14 moment, if you intend to re-file, if anybody here intends to re-  
15 file any of these disputes that you haven't been able to resolve  
16 with regard to discovery responses, you've got three weeks to  
17 put them in. That's all the time I'm giving you. If they're  
18 not in by then, they're waived. Because we're not going to keep  
19 rehashing old territory here. And this case is five years old  
20 at the moment. And we're going to get discovery to a conclusion  
21 to a conclusion.

22 MR. WEINGARD: But, Judge, that is -- maybe I  
23 misunderstood. Isn't that also stayed?

24 THE COURT: Isn't what also stayed?

25 MR. WEINGARD: This is also stayed, and then the three

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1 weeks would be from when to when?

2 THE COURT: I'm not sure you understand what I'm  
3 staying to you. There are other parties here who have  
4 complaints about each other's responses. I know you have  
5 complaints about various responses you got as well. I've said  
6 to you, you're discovery with regard to your client, anybody  
7 coming after to you for discovery is stayed. All right? If you  
8 want to pursue on behalf of your client what information you  
9 haven't gotten, I'll leave that up to you. I'm not requiring  
10 you to do that at this point. I'm focusing on the other parties  
11 who are involved here and their submissions. All right?

12 MR. WEINGARD: Thank you, Your Honor.

13 THE COURT: All right. So, with regard to everyone  
14 else, you've got three weeks. If it's not resolved, I certainly  
15 hope you speak to each other. But if it's not resolved, you've  
16 got three weeks to make your motions for intervention from the  
17 Court. I'll give you a specific date. If they're not made by  
18 that time I'm telling you now, they will be waived and that will  
19 go in the order that goes up from today's conference. That  
20 means you have until July 18.

21 I'm also not staying depositions with the exception of  
22 Defendant Buonora's depositions until that issue is brought up  
23 to Judge Bianco's attention. And it's my understanding that no  
24 depositions have been taken in this case thus far, correct?

25 MR. WEINGARD: No, that's incorrect.

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1 MS. PETILLO: No. That's incorrect, Your Honor.

2 THE COURT: I'm sorry.

3 MS. PETILLO: Officer's Okochino and Barnage --

4 THE COURT: Okay.

5 MS. PETILLO: -- have been deposed. And that was back  
6 in February of 2010.

7 THE COURT: All right. And approximately how many  
8 other witnesses do you have to depose, Mr. Calliste?

9 MR. CALLISTE: Your Honor, that I don't currently  
10 know.

11 THE COURT: Well, how about an approximation? I'm not  
12 asking for an exact number.

13 MR. CALLISTE: All right. Approximately, I believe  
14 around four.

15 THE COURT: All right.

16 MR. CALLISTE: Including the two -- the defendants.

17 THE COURT: All right. And what about on the County's  
18 side, Ms. Petillo?

19 MS. PETILLO: Obviously we would want to depose the  
20 plaintiff in this matter. And I don't know at this time if we  
21 would be deposing the passengers in Mr. Coggins vehicle. That  
22 is an issue that I have to look into.

23 THE COURT: All right.

24 MR. WEINGARD: Your Honor, I can tell you that if the  
25 application is denied, if Judge Bianco denies my application, I

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1 will depose those people.

2 THE COURT: That's fine. All right. I'm giving you  
3 until September 24 to get these depositions done. And then  
4 we're going to have a telephone conference immediately after  
5 that. I'm going to put a telephone conference on for October 2.  
6 That's a Tuesday at 2:00 p.m.

7 MS. PETILLO: Is Plaintiff to organize that, Your  
8 Honor?

9 THE COURT: Yes. All right, Mr. Calliste?

10 MR. CALLISTE: Yes, Your Honor.

11 THE COURT: All right.

12 MR. WEINGARD: Judge, am I required to participate to  
13 those depositions?

14 THE COURT: I'm leaving that up to you. I'm hopeful  
15 that you're going to have an answer from Judge Bianco one way or  
16 another before that time. All right?

17 MR. WEINGARD: The problem is that again --

18 THE COURT: I understand what the problem is. Believe  
19 me; Mr. Weingard, I get the problem. All right? You're going  
20 to see him right away. Let's see where this is going. If this  
21 becomes an issue more for you than what I'm anticipating then  
22 you can contact the court and ask me for further relief.

23 MR. WEINGARD: That's certainly fair.

24 THE COURT: All right. The one issue with regard to  
25 discovery I did want to address and this seems to be a response

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1 from both sets of Defendants; Mr. Calliste, that somehow your  
2 client didn't identify all of his healthcare providers and  
3 provide those records.

4 MR. CALLISTE: Your Honor?

5 THE COURT: Since he's making a claim for emotional  
6 distress damage here.

7 MR. CALLISTE: Right. I do understand our obligations  
8 in that regard. If we could just get another -- I'm not sure  
9 that that has been advised to our office, but if it hasn't a  
10 letter can be made to me and I can --

11 THE COURT: Well, it's in the papers that were  
12 submitted to me, so I'm assuming that's the case, otherwise I  
13 got that from both Mr. Buonora's counsel and I believe from the  
14 County Defendants as well.

15 MR. CALLISTE: Your Honor, we have no intention of  
16 trying to hide any healthcare providers. We'll provide any --

17 THE COURT: No, no, I get all of that. And I'm not  
18 saying -- I'm not getting into an argument with you about it.

19 MR. CALLISTE: Certainly.

20 THE COURT: But this issue was brought up early on in  
21 the case. HIPPA forms were directed to be sent to the  
22 Defendants. They're telling me they didn't get anything. And  
23 that his healthcare providers haven't been fully disclosed. So,  
24 I'm telling you now, you got ten days to get this resolved. All  
25 right? And you talk to Defendants' counsel. If it's your

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1 contention that you served HIPPA forms, then you need to talk to  
2 them.

3 MR. CALLISTE: Yes, Your Honor.

4 THE COURT: And if not, as I said you've got ten days  
5 to get this resolved. That means HIPPA forms in ten days if  
6 they haven't been granted or if they haven't been disclosed  
7 already or provided.

8 MS. PETILLO: Your Honor?

9 THE COURT: Yes.

10 MS. PETILLO: May I address one additional issue with  
11 the Court?

12 THE COURT: Yes.

13 MS. PETILLO: There is the matter of the passengers in  
14 the vehicle. We have been provided with the names, but we  
15 haven't been provided with last known addresses to the extent  
16 that the Plaintiff knows it as they were obviously friends of  
17 the Plaintiffs since they were in his vehicle. So, to prevent  
18 my office having to expend time, energy and expense to try and  
19 track these people down, I would ask that Plaintiff be directed  
20 to provide a last known address for those individuals.

21 THE COURT: Were they in your Rule 26 disclosures?

22 MR. CALLISTE: Their names were, Your Honor. I don't  
23 believe their addresses were --

24 THE COURT: Okay.

25 MR. CALLISTE: -- because I don't believe we knew them

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1 at that time.

2 THE COURT: All right.

3 MR. CALLISTE: I'll take another look, Your Honor.

4 And I don't even think that the Court needs to order that.

5 THE COURT: You've got the same ten days to get that  
6 resolved.

7 MR. CALLISTE: Absolutely.

8 MR. SENFT: Judge, my recollection is that all  
9 together there were two responses identifying witnesses  
10 combined. This is the requirements of Rule 26. We're entitled  
11 to full names, addresses, phone numbers, (indiscernible).

12 MR. CALLISTE: Insofar as we know them, Your Honor, we  
13 have to disclose that.

14 THE COURT: That's right. And if you don't know them,  
15 you have to tell them you don't know them. So, one way or the  
16 other, they've got to have at least one or the other. All  
17 right?

18 MR. CALLISTE: Absolutely, Your Honor.

19 THE COURT: All right.

20 MR. WEINGARD: Would that constitute a particularized  
21 need, Judge, if we can't get the addresses?

22 THE COURT: No comment.

23 MR. WEINGARD: It would be in the grand jury notes,  
24 you know.

25 THE COURT: Well, I suspect that Mr. Calliste is going

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1 to be very helpful in getting that issue resolved, all right?

2 MR. CALLISTE: Yes, Your Honor.

3 THE COURT: All right. What else? There is also  
4 apparently a request for a release for employment information  
5 going to, I believe, mitigation issues.

6 Based on a letter I got, and this is going back a ways  
7 now, from Plaintiff's counsel; an October 28, 2011 letter. It  
8 says it was counsel's understanding that all items were resolved  
9 at the parties' October 14 meet and confer. And counsel  
10 represented that as to the Nassau County Defendants. According  
11 to what I have here, it says Plaintiffs agree to provide and/or  
12 reissue a number of authorizations for medical, psychological,  
13 employment and licensing information. These were served on all  
14 parties via U.S. mail under separate cover.

15 The County Defendants agreed to allow the Plaintiff to  
16 serve additional interrogatories on them solely related to the  
17 new claims and parties that were added in the Plaintiff's second  
18 amended complaint. And as for Defendant Buonora, Plaintiff's  
19 counsel indicated that the Plaintiff went through each one of  
20 Defendant Buonora's responses to the Plaintiff's interrogatories  
21 to which the Plaintiff had a concern, some of which Mr.  
22 Buonora's counsel agreed to rectify while on a conference call.

23 In addition the concerns were followed up in  
24 writing by letter dated October 24, 2011. And based on the  
25 Plaintiff's letter it appears that issues still remain with



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1 regard to Defendant Buonora's responses to interrogatories 1  
2 through 4, 6 and 20. And then Plaintiff's counsel also  
3 indicated that counsel for Defendant Buonora went through every  
4 concern raised regarding Plaintiff's responses. Some of these  
5 items were resolved, insofar as the Plaintiff agreed to  
6 supplement the responses to make it more responsive, which the  
7 Plaintiff is in the process of supplementing. Other items were  
8 resolved insofar as Plaintiff agreed to continue the search for  
9 certain documents requested which the Plaintiff is currently in  
10 the process of doing.

11 And then we get the October 28 letter from Defendant  
12 Buonora's counsel saying nothing was resolved during that phone  
13 conference and that there are all of these still outstanding  
14 issues. So, again there's an issue here with regard to whether  
15 the information on employment, licensing, and medical and  
16 psychological records were provided. So, again as I said, that  
17 I need to get that resolved in the next ten days.

18 MR. CALLISTE: Yes, Your Honor.

19 THE COURT: All right? All right. Anything further  
20 anybody needs to address before we conclude?

21 MR. CALLISTE: Your Honor, just a date certain with  
22 respect to the ten days.

23 THE COURT: How's your math today?

24 (Laughter.)

25 MR. WEINGARD: We're lawyers, Judge.

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1 THE COURT: That would be put you at --

2 MR. WEINGARD: The word is lousy.

3 THE COURT: -- literally at July 6. Because of the  
4 holiday, you can have until July 9. All right?

5 MR. CALLISTE: Thank you, Your Honor.

6 THE COURT: All right. Anything further, Ms. Petillo,  
7 on behalf of the County?

8 MS. PETILLO: No, Your Honor. Thank you.

9 THE COURT: All right. Mr. Weingard, anything  
10 further?

11 MR. WEINGARD: No, ma'am.

12 THE COURT: All right. All right. Mr. Senft, I take  
13 it you speak as one?

14 MR. SENFT: Exactly, Judge.

15 MR. WEINGARD: We do.

16 THE COURT: All right. Very good. We're concluded  
17 then. Thank you.

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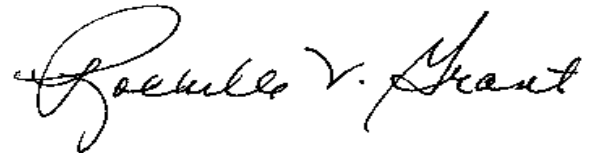
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CERTIFICATION

I, Rochelle V. Grant, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: July 9, 2012

A handwritten signature in cursive script that reads "Rochelle V. Grant". The signature is written in black ink and is positioned above a horizontal line.

Signature of Approved Transcriber